Nos. 78-1412, 78-6369 and 78-6431

In the Supreme Court of the United States

OCTOBER TERM, 1978

DONALD JAMES, PETITIONER

v.

UNITED STATES OF AMERICA

HENRY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

KENNETH WAYNE WHITMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
ANN T. WALLACE
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals en banc (Pet. App. B1-B23)[1] is reported at 590 F. 2d 575. The panel

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[1] "Pet. App." refers to the appendix to the petition in No. 78-1412.

opinion of the court of appeals (Pet. App. A1-A14) is reported at 576 F. 2d 1121.

JURISDICTION

The judgment of the court of appeals en banc was entered on February 12, 1979. The petitions for a writ of certiorari in Nos. 78-1412 and 78-6369 were filed on March 14, 1979. On March 15, 1979, Mr. Justice Rehnquist extended the time for filing the petition for a writ of certiorari in No. 78-6431 to and including March 27, 1979. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission of out-of-court statements of petitioners' co-conspirators constituted reversible error.

2. Whether the evidence was sufficient to establish each petitioner's participation in the conspiracy.

3. Whether the evidence established the existence of a single conspiracy (Nos. 78-1412 and 78-6431).

STATEMENT

Following a jury trial of petitioner James and others, and a subsequent jury trial of petitioners Smith and Whitmore, in the United States District Court for the Northern District of Georgia, each petitioner was convicted of conspiracy to possess heroin and cocaine with intent to distribute, in violation of 21 U.S.C.

841(a)(1) and 846.[2] Each was sentenced to the custody of the Attorney General under 18 U.S.C. 4205(c) for the maximum period of 15 years. Thereafter, petitioner Whitmore was sentenced to 12 years' imprisonment with a special parole term of three years.

1. The evidence at both trials, which is summarized in the panel opinion of the court of appeals (Pet. App. A1-A14), established a conspiracy to distribute heroin and cocaine in Atlanta and Philadelphia, with Fred Hill as the central figure. Hill obtained his supply from sources in California (Pet. App. A3).

In early 1974, Johnny Mack Gordon, an unindicted co-conspirator, assisted Hill in distributing packages of what Hill referred to as "boy," a street term for heroin, from Hill's white Mercury "stash" car. On instructions from Hill, Gordon made deliveries to Hill's Atlanta customers, collecting from $1,000 to $1,200 per ounce. When Gordon made his first delivery, the car contained 25 one-ounce packages. It was refilled on two occasions before Gordon's arrest in August 1974. The car was seized at the same time, and 44 ounces of heroin and three ounces of cocaine were found in it (Pet. App. A3).

The evidence further showed that sometime around New Year's Eve in 1973, petitioner James flew from Philadelphia to Atlanta and obtained heroin from Hill, who took it from a white Ford or Mercury. James directed co-conspirator Marlene Cochran to repackage

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[2]Petitioner Smith was originally tried together with petitioner James, but the jury was unable to agree on a verdict as to Smith. He was subsequently tried with petitioner Whitmore, who had been a fugitive at the time of the first trial (Pet. App. A3).

it and take it back to Philadelphia. On a later occasion Hill telephoned petitioner Smith and stated that he was looking for petitioner James because he had a package to be picked up by James for distribution on the streets (Pet. App. A3-A4).

The evidence at the trial of petitioners Smith and Whitmore showed that in the late spring or early summer of 1974, Gordon, relying upon a representation by Whitmore of a pre-existing agreement between himself and Hill, gave Whitmore two packages from the "stash" car. The evidence also showed that Whitmore failed to appear for trial on the date originally set and, when subsequently arrested, denied his identity. He was carrying another person's driver's license at the time (Pet. App. A4-A5).

The evidence further showed that from the summer to the fall of 1974, co-conspirator Marlene Cochran sold narcotics in Philadelphia for Smith from Smith's apartment or her own. In November 1974, she visited Smith's residence in Atlanta, where she received a call from Hill, who wanted to find James. Later Smith told her about a telephone conversation with Hill during which Hill said that he had a package for James to purchase in Ohio. When James could not be located, Smith agreed to accept the package. He then directed his daughter to obtain $2,000 and to pick up the package in Ohio (Pet. App. A6).

Prior to trial petitioners requested a pretrial hearing outside the presence of the jury to determine the admissibility of co-conspirator statements. The district court denied the motion, stating that cautionary instructions of the kind required in *United States* v.

Apollo, 476 F. 2d 156 (5th Cir. 1973), would adequately protect the defendants (Pet. App. A8).

2. A panel of the court of appeals affirmed the convictions (Pet. App. A1-A14). It observed that because petitioners had moved for a pretrial hearing outside the presence of the jury to determine the admissibility of co-conspirator declarations, citing Fed. R. Evid. 104(a) and (c), it was required to consider the effect of the Federal Rules of Evidence upon previous Fifth Circuit law, which allocated the responsibility of determining the admissibility issue to the jury (Pet. App. A8). See *United States* v. *Apollo, supra.* The panel held first that because co-conspirator declarations carry risks of prejudice similar to those attending the determination of the voluntariness of a confession, their admissibility, like the admissibility of allegedly coerced confessions, should be determined by the trial judge under Rule 104(a) (*id.* at A10-A12).

The panel then decided on the standard to be applied by the judge—one "high enough to afford adequate protection to the defendant against whom the evidence is offered, yet not so high as to exclude trustworthy relevant evidence" (*id.* at A12). It concluded that the proper standard is proof "by a preponderance" of the independent evidence "that the conspiracy existed, that the defendant and the declarant were members of it, and that the statements were made in the course of and in furtherance of the conspiracy" (*ibid.*). Applying this "preponderance" standard, the panel held that the co-conspirator declarations were properly admitted in these cases (*id.* at A14). The panel further held that a trial judge can no longer allow the jury to hear a co-

conspirator declaration until the court has made the preliminary determination that it is admissible, following either the development of independent proof at trial or an extrajury showing of proof (*id.* at A13-A14).

On other issues raised on appeal, the panel held that the evidence was sufficient to support the jury's verdict as to petitioners James, Smith, and Whitmore (*id.* at A4-A6), that Whitmore's participation in the conspiracy was adequately shown by nonhearsay evidence (*id.* at A5), and that the evidence established "a unified scheme in which all appellants joined" rather than multiple conspiracies (*id.* at A6-A7).

3. On en banc review, the court of appeals affirmed the convictions, adopting the panel opinion on all issues except the portion concerning the proper treatment of co-conspirator declarations (Pet. App. B3). The majority, exercising its supervisory power, substituted for *Apollo* a procedure requiring the trial court to determine admissibility "normally * * * before the [out-of-court declaration] is heard by the jury" (*id.* at B7). For this initial determination, the court instructed, the trial court is to employ a standard of "substantial" independent evidence (*id.* at B7-B8); but at the conclusion of the trial, a trial judge reviewing the admission of co-conspirator statements must employ a preponderance standard (*id.* at B9). The court concluded, however, that it would "not disturb the conclusion reached by the panel of this Court that the admission of the hearsay statements was fully supported because there was 'a preponderance of the independent evidence that the conspiracy existed, that

each of the defendants and appellants were members of it, and that the statements were made in the course of and in furtherance of the conspiracy' " (*id.* at B10).[3]

ARGUMENT

1. Petitioners James (78-1412 Pet. 6-8) and Whitmore (78-6431 Pet. 11, 23) contend that this Court should resolve a conflict among the circuits as to the appropriate standard for admission of co-conspirator statements.[4]

But as we have frequently stated in our oppositions to certiorari petitions in this Court (see, *e.g.*, *Macklin* v. *United States*, cert. denied, No. 77-6895 (Oct. 2, 1978)),[5] whatever the proper standard for determining the admissibility of co-conspirator statements, it seems likely that the variance in its formulation will seldom, if ever, produce different results. Indeed, in the instant cases the evidence of the existence of the conspiracy and petitioners' participation therein met the "prima facie" test employed by the district court, the "reasonable doubt" test presumably employed by the jury under the *Apollo* rule, and the "preponderance" standard used by the panel and the en banc court below. Accordingly, resolving the conflict on the formulation of the test would not aid petitioners.

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[3]The court also held that the prescribed new procedure would be required only for trials commencing 30 days after its opinion issued (*ibid.*).

[4]The conflict is discussed by the en banc court (Pet. App. B7 n.4).

[5]We are furnishing copies of the government's brief in *Macklin* to petitioners' counsel.

These cases thus are not appropriate vehicles for reviewing the question.

2. Petitioners James (78-1412 Pet. 8-10) and Smith (78-6369 Pet. 8, 11-13) further contend that the court of appeals should have remanded their cases to the district judge for a hearing in accordance with Rule 104(c) of the Federal Rules of Evidence and an on-the-record determination of the admissibility of co-conspirator statements. This, however, would have been a useless gesture, since both the panel and the en banc court concluded that the independent evidence at each petitioner's trial met the preponderance standard as a matter of law (Pet. App. A14, B10).

Moreover, the new procedures for admitting co-conspirator statements adopted by the en banc court have been established not because the court considered that the *Apollo* procedures deny defendants a fair trial, but because the court concluded that the new procedures would obviate "the 'danger' to the defendant if the statement is not connected and because of the inevitable serious waste of time, energy and efficiency when a mistrial is required" (Pet. App. B9). The court's decision to give only prospective application to its new rules regarding co-conspirator statements is in accord with the practice of other courts[6] and does not deny

[6]Decisions in other circuits interpreting Rule 104(a) to require the judge to determine admissibility have been consistently applied only prospectively. See, *e.g.*, *United States* v. *Santiago*, 582 F. 2d 1128, 1135 (7th Cir. 1978); *United States* v. *Enright*, 579 F. 2d 980, 986-987 (6th Cir. 1978); *United States* v. *Bell*, 573 F. 2d 1040, 1044-1045 (8th Cir. 1978); *United States* v. *Martorano*, 557 F. 2d 1, 11 (1st Cir.), aff'd on rehearing, 561 F. 2d 406 (1977), cert. denied, 435 U.S. 922 (1978).

petitioners any rights to which they are entitled. Indeed, as the panel of the court of appeals stated (Pet. App. A14 n.9), under *Apollo* procedures the defendants in these cases received a "significant safeguard" that will not be afforded future defendants—the admissibility of co-conspirator statements under *Apollo* was judged under the stringent reasonable doubt standard.

3. Petitioner Whitmore contends (78-6431 Pet. 9, 12) that the evidence of his participation in the conspiracy, independent of the co-conspirator statements, was insufficient to support admission of such statements. As the panel observed in rejecting this claim (Pet. App. A5): "Whitmore's own statement to Gordon * * * provides proof of all of the essential elements of the conspiracy charged." Whitmore told Gordon that he had discussed a transaction with Hill, and, while Hill was out ot town, he accepted two ounces of heroin from Gordon. By his own words and conduct Whitmore demonstrated that he had "a consensual agreement" with Hill and that he knew that Gordon worked for Hill in distributing heroin (*ibid.*). Accordingly, his role was sufficiently shown by evidence independent of the co-conspirator statements admitted at his trial.

4. Each petitioner contends (see 78-1412 Pet. 12-16; 78-6369 Pet. 7-8; 78-6431 Pet. 9) that the evidence was insufficient to establish his participation in the conspiracy. The panel below properly concluded that the evidence as to each petitioner amply demonstrated his role in the narcotics conspiracy charged.

The evidence showed that James transported to Philadelphia heroin obtained from Hill in Atlanta, and that he was called by Hill at Smith's house to pick up a package in Ohio. As the panel concluded, "these two incidents are sufficient to support the jury's verdict of guilty beyond a reasonable doubt" (Pet. App. A4). The fact that this evidence was given by a witness (Cochran) who took drugs and who admitted to being "high" during part of her trip to Atlanta with James goes to its weight and does not destroy its sufficiency, as petitioner James contends (78-1412 Pet. 13-16), particularly since Cochran's testimony was corroborated in some details by the testimony of Johnny Mack Gordon (compare Pet. App. A3 with Pet. App. A4).

In addition to the independent evidence of Whitmore's participation (discussed *supra*, page 9), the government showed that when Hill returned to town and learned that Gordon had given Whitmore two ounces of heroin, Hill told a co-conspirator that Whitmore already owed him money for five ounces of heroin and that Gordon had given Whitmore five more ounces, for which Hill had not been paid. Later Hill told the same co-conspirator that Whitmore had paid him. This evidence, coupled with Whitmore's own statements to Gordon and his failure to appear at trial, amply supported his conviction (see Pet. App. A4-A5).

Smith's participation in the conspiracy was shown by evidence that he sold narcotics in Philadelphia and that he agreed to pick up a "package" of Hill's in Ohio that was intended for James. As the panel below concluded (Pet. App. A6), Smith "must have known about Hill's operation and that others, James, for example, were involved in it"; by entering into an agreement with Hill, he joined the conspiracy.

5. Petitioners James (78-1412 Pet. 10-12) and Whitmore (78-6431 Pet. 10, 28-30) contend that the evidence was insufficient to show that there was a single conspiracy as alleged in the indictment. They argue that the government failed to prove that the several conspirators were aware of each other and operated within a common scheme to distribute cocaine and heroin. The panel of the court of appeals, however, correctly rejected their contention, explaining (Pet. App. A6-A7):

> The existence of multiple conspiracies is a fact question for the jury * * * and there is ample support in the record for the jury's conclusion that the appellants were members of the one conspiracy alleged. Each appellant dealt with Hill or Gordon under circumstances which clearly demonstrated their knowledge of the fact that Hill's operation encompassed more than just Hill.

But even assuming that the evidence showed two separate conspiracies, as both petitioners claim, "[t]he true inquiry * * * is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger* v. *United States*, 295 U.S. 78, 82 (1935). We submit that "substantial rights" were not infringed in these cases. The allegations in the indictment "definitely informed [petitioners] as to the charges against [them], so that [they could] * * * present [their] defense[s] and not be taken by surprise by the evidence offered at the trial," and it further "protected [them] against another prosecution for the same offense" (*ibid.*).

Nor, on the facts of these cases, were petitioners or their co-defendants prejudiced by the "dangers of

transference of guilt from one to another across the line separating conspiracies * * *." *Kotteakos* v. *United States*, 328 U.S. 750, 774 (1946). Unlike *Kotteakos*, these cases involved a relatively simple set of facts. The alleged variance between the indictment and the proof at trial is thus "entirely different" from the problem arising from the eight separate conspiracies presented to the jury in *Kotteakos* (328 U.S. at 766). The transactions in these cases were easily distinguishable. Petitioner James was involved in purchasing heroin from Hill, causing it to be delivered to Philadelphia, and attempting to sell a package in Ohio. Petitioner Whitmore was involved in a transaction with Gordon, Hill's agent, and a transaction with Hill himself. The evidence relating to each transaction was presented to the jury in a compartmentalized fashion, without any overlap. Neither petitioners nor their co-defendants suffered any "loss of identity in the mass," with the concomitant danger of an "unwarranted imputation of guilt from others' conduct." *Kotteakos* v. *United States*, *supra*, 328 U.S. at 776-777. Indeed, the distinctness of each sale is precisely what has given rise to the variance issue here.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JEROME M. FEIT
ANN T. WALLACE
Attorneys

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